

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE  
AT NASHVILLE

Assigned on Briefs February 13, 2007

**STATE OF TENNESSEE v. LISA ANN HUDSON**

**Direct Appeal from the Circuit Court for Bedford County  
No. 15834 Robert Crigler, Judge**

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**No. M2006-01051-CCA-R9-CO - Filed June 27, 2007**

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The defendant, Lisa Ann Hudson, was indicted for the aggravated child abuse and neglect, *see* Tenn. Code Ann. § 39-15-402, of her unborn fetus. Thereafter, the defendant filed a motion to dismiss the indictment on the ground it did not state a criminal offense, which the trial court denied. This Rule 9 interlocutory appeal followed for this court to determine whether the trial court erred in denying the defendant's motion to dismiss. Following our review of the record and the parties' briefs, we reverse the judgment of the trial court and dismiss the indictment.

**Tenn. R. App. P. 9 Interlocutory Appeal; Judgment of the Circuit Court Reversed and  
Dismissed**

J.C. McLIN, J., delivered the opinion of the court, in which DAVID G. HAYES and JERRY L. SMITH, JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee, for the appellant, Lisa Ann Hudson.

Robert E. Cooper, Jr., Attorney General and Reporter; Elizabeth B. Marney, Assistant Attorney General; W. Michael McCown, District Attorney General; and Michael D. Randles and Ann L. Filer, Assistant District Attorneys General, for the appellee, State of Tennessee.

**OPINION**

This case arises out of the defendant's ingestion of cocaine during her pregnancy, which caused her unborn child to suffer serious bodily injury.<sup>1</sup> For these actions, the defendant was indicted for aggravated child abuse and neglect pursuant to Tennessee Code Annotated section 39-15-402. The indictment alleged that the offense occurred "on or about the 2nd day of March 2005," which was the date of the child's birth. The defendant moved to dismiss the indictment on grounds that it did not state a criminal offense, arguing that a viable fetus was not a "child" for purposes of

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<sup>1</sup> At the hearing on the motion to dismiss, the parties stipulated that the child was born addicted to cocaine due to the defendant's ingestion of the drug during her pregnancy.

the child abuse and neglect statute. The trial court denied the defendant's motion, stating that Tennessee Code Annotated section 39-13-107 was dispositive of the issue, but granted her request to pursue a Rule 9 interlocutory appeal. On appeal, the defendant argues that the trial court erred in denying her motion to dismiss the indictment. The state agrees with the defendant.

Tennessee Code Annotated section 39-15-402 states:

(a) A person commits the offense of aggravated child abuse or aggravated child neglect or endangerment, who commits the offense of child abuse, as defined in § 39-15-401(a), or who commits the offense of child neglect or endangerment, as defined in § 39-15-401(b), and:

(1) The act of abuse or neglect results in serious bodily injury to the child; [or]

(2) The act of neglect or endangerment results in serious bodily injury to the child[.]

“Any person who knowingly, other than by accidental means, treats a child . . . in such a manner as to inflict injury commits a Class A misdemeanor” if the abused child is under eighteen years of age or a Class D felony if the abused child is six years of age or less. *Id.* § 39-15-401(a). “Any person who knowingly abuses or neglects a child . . . so as to adversely affect the child's health and welfare, commits a Class A misdemeanor” if the abused or neglected child is under eighteen years of age or a Class E felony if the abused or neglected child is six years of age or less. *Id.* § 39-15-401(b).

Two advisory opinions from the Tennessee Attorney General and an unpublished opinion from this court provide persuasive authority that these child abuse statutes are not applicable to punish actions committed against an unborn fetus. In Tennessee Attorney General Opinion No. 95-023, the Attorney General answered the precise question of whether cocaine use by a pregnant woman constituted either child abuse or aggravated child abuse. After noting that Tennessee courts have historically distinguished between a “fetus” and a “child,” the Attorney General concluded that for purposes of the child abuse statutes, the term “child” did not include a fetus, whether viable or not. Tenn. Op. Att’y. Gen. No. 95-023, 1995 WL 144713 (1995); *see also* Tenn. Op. Att’y. Gen. No. 02-136, 2002 WL 31912595 (2002) (noting as examples, sections 39-13-107, 39-13-214, and 20-5-106 of the Tennessee Code where “fetus” is specifically included because the legislature intended for a fetus to fall within the purview of those statutes).

A panel of this court in *Jessica Renee Richards v. State*, addressed a situation where two mothers pled guilty to attempted aggravated child abuse stemming from their infants' positive drug screens at birth. Nos. E2004-02326-CCA-R3-PC, E2004-02327-CCA-R3-PC, 2005 WL 2138244, at \*1 (Tenn. Crim. App., at Knoxville, Sept. 2, 2005). In their appeal following denial of post-conviction relief, the mothers argued that they received the ineffective assistance of counsel and

unknowingly pled guilty because they were not advised of authority that indicated they could not be guilty of child abuse for using drugs during pregnancy. *Id.* This court granted post-conviction relief, concluding that because the legislature had not amended the child abuse statutes to include a viable fetus within the definition of “child,” the mothers could not be guilty for actions committed against a fetus. *Id.* at \*4.

Here, the trial court relied on Tennessee Code Annotated section 39-13-107 to deny the defendant’s motion to dismiss the indictment. That provision provides, “For purposes of this part, ‘another,’ ‘individual,’ ‘individuals,’ and ‘another person’ include a viable fetus of a human being, when any such term refers to the victim of any act made criminal by the provisions of this part.” *Id.* § 39-13-107(a). Clearly, the reference to “this part” is to Part 1 of Chapter 13 – assaultive offenses, not child abuse and neglect which is listed in Chapter 15 Part 4. Furthermore, section 39-13-107(a) specifically states that references to “another,” “individual,” “individuals,” and “another person” include a viable human fetus as victim, notably absent from this list are references to “child.”<sup>2</sup>

We are persuaded by the findings of the Tennessee Attorney General and the *Richards* court, and conclude that the trial court’s reliance on section 39-13-107 is misplaced. Had the legislature intended for the child abuse statutes to include a “viable fetus as victim,” it would have amended the statutes as it has done for assaultive and homicide offenses. When interpreting a statute, our interpretation is restricted to the natural and ordinary meaning of the language used. *See State v. Denton*, 149 S.W.3d 1, 17 (Tenn. 2004); *Browder v. Morris*, 975 S.W.2d 308, 311 (Tenn. 1998). Our role is to “ascertain and give effect to the legislative intent without unduly restricting or expanding a statute’s coverage beyond its intended scope.” *Owens v. State*, 908 S.W.2d 923, 926 (Tenn. 1995); *see also State v. Jennings*, 130 S.W.3d 43, 46 (Tenn. 2004). Moreover, “penal statutes are to be strictly construed against the state and not extend by implication . . .” *State v. Banks*, 875 S.W.2d 303, 308 (Tenn. Crim. App. 1993).

We note that this court in no way condones the defendant’s actions and, interestingly, there is legislation pending in the Tennessee General Assembly seeking to amend Tennessee Code Annotated section 39-15-401 to criminalize the knowing or non-accidental ingestion of illegal or unprescribed controlled substances by pregnant persons. *See* S.B. 1575, 2007 Leg., 105th Sess.; H.B. 1846, 2007 Leg., 105th Sess.<sup>3</sup> However, under the present law, we are constrained to conclude that the trial court erred in denying the defendant’s motion to dismiss. Accordingly, we reverse the judgment of the trial court and dismiss the indictment.

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<sup>2</sup> Although not relied upon by the trial court, Tennessee Code Annotated section 39-13-214 contains similar language that includes a viable fetus within the definition of victim for purposes of Part 2 – criminal homicides.

<sup>3</sup> These proposed bills seek to amend Tennessee Code Annotated section 39-15-401(a) by inserting the following language as subdivision (2): “Any person who is pregnant with a child of any gestational age, from fertilization through birth of the child, and who knowingly, other than by accidental means, ingests any illegal substance or controlled substance not prescribed by a physician, commits a Class D felony.”

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J.C. McLIN, JUDGE